

**LUANNE F. OVERTON, M.A., Plaintiff, )  
and PHILLIP GUINSBERG, Ph.D., )**

**Plaintiff/Appellant, )**

**VS. )**

**THE BOARD OF EXAMINERS IN )  
PSYCHOLOGY OF THE STATE )  
OF TENNESSEE, )**

**Defendant/Appellee. )**

**Davidson Chancery  
No. 94-2839-I**

**Appeal No.  
01-A-01-9603-CH-00098**

**FILED**

**November 13, 1996**

**Cecil W. Crowson  
Appellate Court Clerk**

**IN THE COURT OF APPEALS OF TENNESSEE**

**MIDDLE SECTION AT NASHVILLE  
APPEAL FROM THE CHANCERY COURT OF DAVIDSON COUNTY**

**AT NASHVILLE, TENNESSEE  
HONORABLE IRVIN H. KILCREASE, CHANCELLOR**

**CHARLES W. BURSON  
Attorney General and Reporter**

**SUE A. SHELDON  
Assistant Attorney General  
1510 Parkway Towers  
404 James Robertson Parkway  
Nashville, Tennessee 37243  
ATTORNEY FOR PLAINTIFF/APPELLEE**

**WILLIAM A. CRAGG  
200 Fourth Avenue No.  
3rd Floor, Noel Place  
Nashville, Tennessee 37219  
FOR DEFENDANT/APPELLANT**

**AFFIRMED AND REMANDED**

**HENRY F. TODD  
PRESIDING JUDGE, MIDDLE SECTION**

**CONCUR:**

**SAMUEL L. LEWIS, JUDGE  
WILLIAM C. KOCH, JR., JUDGE**

<b>LUANNE F. OVERTON, M.A., Plaintiff,</b>	)	
<b>and PHILLIP GUINSBERG, Ph.D.,</b>	)	
	)	
<b>Plaintiff/Appellant,</b>	)	
	)	<b>Davidson Chancery</b>
	)	<b>No. 94-2839-I</b>
<b>VS.</b>	)	
	)	<b>Appeal No.</b>
	)	<b>01-A-01-9603-CH-00098</b>
<b>THE BOARD OF EXAMINERS IN</b>	)	
<b>PSYCHOLOGY OF THE STATE</b>	)	
<b>OF TENNESSEE,</b>	)	
	)	
<b>Defendant/Appellee.</b>	)	

**OPINION**

The appeal involves judicial review under the Administrative Procedure Act of the action of the Board of Examiners in Psychology in ordering discipline of Phillip Guinsberg, a licensed Psychologist. The other captioned plaintiff is not an interested party to this appeal. The Trial Court affirmed the action of the Board, and Philip Guinsberg appealed to this Court.

The 8-page order of the Board contains a finding that appellant was guilty of:

1. Unprofessional, dishonorable, or unethical conduct. TCA 63-11-215(b)(1).
2. Willfully betraying a professional secret. TCA 63-11-215(b)(6).
3. Repeated malpractice and negligence. TCA 63-11-215(b)(4).

The order imposes the following discipline:

1. Respondent’s license to practice psychology is suspended for a period of two years from the date of the filing of this Order with the Administrative Procedures Division of the Secretary of State.
2. The rehabilitative efforts ordered by this Board for the Respondent are to be coordinated with and through the Tennessee Board of Examiners in Psychology
3. Respondent shall undergo a psychological assessment performed by a Tennessee licensed psychologist approved to perform such assessment of Respondent by this Board.

Respondent shall direct and authorize the psychologist performing the assessment to submit the results, in writing, to the Board for review. The Board shall at that time make further recommendations, if necessary, subject to the results and recommendations of the psychological assessment.

4. Respondent shall submit to the Board a name, or names, if necessary, of psychologists for approval to perform the psychological assessment of Respondent. Respondent shall receive approval of the psychologist before the assessment is performed. Respondent shall ensure the completed assessment has been submitted to the Board on or before February 14, 1995. The costs of this assessment are to be borne by Respondent.
5. Respondent shall enroll in and complete a nine (9) hour course of study for credit at an accredited institution of higher education. Respondent shall obtain Board approval of this course of study before undertaking the same. The course of study must include a course in professional affairs and ethics, a course in psychotherapy for trauma victims or a course in chemical dependency, and a course in supervision of psychological services.
6. Respondent may practice psychology on a pro bono basis until September 30, 1994, in order to allow for the orderly termination or transfer of his psychology clientele.
7. Respondent shall appear before the Board at the meeting of the Board occurring immediately prior to the close of the two year suspension period.

The petition for review filed by appellant in the Trial Court asserts:

- (a) The decision was in violation of constitutional and statutory provisions;
- (b) The decision was made upon unlawful procedure;
- (c) The decision reflects arbitrary and capricious finding of the Board characterized by an abuse of discretion and a clear unwarranted exercise of discretion; and
- (d) The decision is unsupported by the evidence in light of the entire record.

The memorandum of the Trial Court states:

The petitioner alleges that he was not afforded due process by Board because individual Board members' failure to address all facts and issues in the case. This issue does not merit a reversal of the full Board's decision because the record demonstrates that there was deliberate and thoughtful

consideration of the facts and issues of this case. More succinctly stated, the petitioner bases his objection upon the weight given to certain facts and issues versus the Board's consideration of those facts and issues. Without question, it is the Board's role to be the fact finder and assess the credibility of witnesses. It is not within this Court's jurisdiction to do so.

The Final Orders of the Board is supported by substantial and material evidence in the record. Thus, the Court finds that the Dr. Guinsburg's due process rights were not violated.

The Court finds that the disciplinary sanctions against the Dr. Guinsburg are not arbitrary and capricious. "So long as the sanctions imposed by an agency are within the scope of its statutory authority, the reviewing court should not substitute its judgment for that of the agency, unless the penalty is so clearly disproportionate to the offense and completely inequitable in light of the surrounding circumstances as to be shocking to the conscience of the Court." 73A CJS Public Administrative Law and Procedure § 223 (1983). Considering the record as a whole, the Court does not find the discipline issued by the Board to be shocking to the conscience of the Court.

The judgment of the Trial Court affirms the order of the Board.

The brief of appellant contains no statement of the issues for review as required by TRAP Rule 27(a)(4). However, the written argument presents two contentions as follows:

Plaintiffs' Constitutional Rights to Due Process of Law  
Were Violated by the Board of Examiners in Psychology  
Of the State of Tennessee

The Board's Decisions Violated the Uniform  
Administrative Procedures Act Pursuant to Tenn. Code  
Ann. § 4-5-322(h)

Substitute counsel has filed a supplemental brief which also omits a statement of the issues on appeal and pursues other insistences not presented in appellants original brief. Appended to the supplemental brief is a series of documents which cannot be considered by this Court because none has been certified to this Court by the Trial Clerk as part of the record on appeal.

I. **FIRST COMPLAINT ON APPEAL - VIOLATION OF CONSTITUTIONAL**  
**RIGHTS**

Appellant's argument asserts that his constitutional rights were violated in the following way:

The hearings before the Board were conducted unfairly as to plaintiffs, especially with respect to the Board's deliberations. Significantly, (1) the Board relied on evidence outside of the hearings and evidence not shared with plaintiffs. (2) The Board did not review transcripts or testimony of witnesses, even though the hearings lasted for ten days over a ten month period, relying Instead entirely on their own recollections (Tr. Vol. I, 105). For example, (3) Board member, Dr. Paul assessed Dr. Guinsburg's body language and concluded Dr. Guinsburg did not show remorse. She essentially preempted any evidence presented at the hearing about Dr. Guinsburg's remorse by presenting her own "expert testimony" outside of the formal hearing context. (4) Another Board member, Mrs. Ramey, apparently relying on Dr. Paul's "testimony," stated she was concerned about the lack of remorse shown by Dr. Guinsburg. Depriest Affidavit, ¶ 18 (Tr. Vol. I, 105) (5). Dr. Guinsburg not only did not know he was being evaluated, but also had no opportunity to cross-examine or otherwise discredit Dr. Paul's opinion.

(6) Obviously, plaintiffs have a substantial personal and financial interest in maintaining their right to practice psychology, and to practice with the colleague of their choice, and due process protection depends on the extent to which an individual will be "condemned to suffer grievous loss." (7) Moreover, in the instant case, the interest of the patients of Dr. Guinsburg and Ms. Overton, who are already in a fragile emotional condition, must also be considered.

1. Appellant cites no evidence to support his first general assertion.
2. Appellant cites no authority holding that a board violates any right by relying upon memory of testimony rather than a reading of the record of the testimony.

3. Appellant cites no authority that a finder of fact may not judge the credibility of a witness by the demeanor of the witness while testifying.

4. No authority is cited for reversal of disciplinary action based in part upon apparent lack of remorse, or discussion of same by Board members during their deliberations.

5. As a psychologist, appellant should have known that his demeanor would be observed by the members of the Board and discussed by them in their deliberations.

6 & 7. Are irrelevant to issues before the Board.

II. **SECOND COMPLAINT ON APPEAL - VIOLATION OF ADMINISTRATIVE  
PROCEDURE ACT**

Appellant asserts that the decision of the Board was (1) made upon unlawful procedure. However, appellant's brief does not point out any procedures of the Board upon which this allegation is based. Appellant next insists that:

A. The Board's findings were arbitrary or capricious and characterized by abuse of discretion or clearly unwarranted unwarranted exercise of discretion.

Appellant complains that the Board imposed punishment more severe than that suggested by the attorney for the State, but cites no authority that a Board is limited to that suggested by counsel.

Appellant complains that the Board did not treat him equally with his co-defendant in the consolidated hearing, but cites no authority for equal punishment of co-defendants charged separately in separate cases. Moreover, the co-defendant was not a licensed clinical psychologist.

Appellant complains that the Board allowed him only 30 days to terminate relations with his clients, but does not mention that, by judicial stays, his practice has continued to the present time.

Appellant next asserts that:

B. The Board's conclusions were not supported by substantial and material evidence in light of the entire record.

The Board conducted hearings aggregating ten days, and produced an evidentiary record consisting of 16 volumes containing 1,891 pages plus 31 exhibits. Included in the record is the testimony of "Client A" and "Client B" who stated that appellant communicated to Client B confidential personal information received from Client A and another client, the plaintiff, Luanne Overton. The record contains uncontradicted evidence that appellant wrongfully employed Luanne Overton in his office while he was treating her as a client, thereby creating a "dual relationship" in violation of his duty as a treating psychologist. There is also evidence that appellant attempted to persuade "Client B" to agree to "ghost-write" a book to be published by Luanne Overton and appellant. This testimony constitutes material and substantial evidence supporting the Board's finding of misconduct in violation of the proven duties of a treating psychologist and conclusions of the Board as to its seriousness.

The foregoing disposes of the issues presented by appellant's first brief. The burden of his supplemental brief is that the discipline imposed by the Board is excessive, because the Board allegedly ignored various vitigating circumstances, allegedly engaged in improper deliberations, and administering discipline more severe than administered to other accused psychologists, none of the complaints of the supplemental brief merit reversal under this record.

No ground is found for modification or reversal of the action of the Board.

The judgement of the Trial Court and the action of the Board are affirmed. Costs of this appeal are taxed against appellant and his surety. The cause is remanded to the Trial Court for any necessary further procedure.

**AFFIRMED AND REMANDED.**

---

HENRY F. TODD  
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

---

SAMUEL L. LEWIS, JUDGE

---

WILLIAM C. KOCH, JR., JUDGE